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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 341

CARL V. DANIELS AND JAMES E. SPEENEY,
Petitioners,

vs.

FLORIDA POWER & LIGHT COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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28 U.S.C.A.:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Carl V. Daniels and James E. Speeney, pray that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit, entered on May 8, 1963 and opinion modifying same.

Reports of the Courts Below

The orders of Honorable DAVID W. DYER, U. S. D. J., Judge of the United States District Court for the Southern District of Florida, dated December 20, 1961, dismissing the Libel herein and from a final decree in favor of respondent, dated December 20, 1961, are printed in the Record below.

The decision of the Circuit Court of Appeals for the Fifth Circuit has been officially reported at 317 F. 2d 41. The opinion, modifying same has been printed in the appendix though not officially reported as yet.

Jurisdiction

The opinion of the court below was filed on May 8, 1963.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A. 1254 (1) and 2101.

Questions Presented

1. May the alleged assumption of risk and contributory negligence of a drowning seaman be imputed to his rescuer as a bar to such rescuer's action for damages proximately suffered during his rescue efforts?

2. When the provisions of state law supplement that of maritime law, is a seaman entitled to the protection and benefits of both or is the state law concept of contributory negligence and assumption of risk a complete bar?

3. Is the question of seaworthiness determined on the basis of reasonable fitness for the intended purpose or its freedom from inherent danger?

4. Is the duty of seaworthiness limited to the owner of a vessel, or does the duty apply with equal force to the owner of appurtenances of the vessel, such as a gangplank provided for boarding the ship?

5. When a seaman suffers injuries proximately caused by the unsafe condition of ship's appurtenance, such as a defective gangplank, is liability imposed as a matter of law against the owner of the appurtenance who authorized or consented to its use, irrespective of the ownership of the vessel itself?

6. Is the decision by the court below the enunciation of a radical and erroneous principle of law in conflict with established and uniform prior decision, misinterpreting the holdings in the very cases relied on by said court?

Reasons for Granting the Writ

1. The restriction of the definite congressional intent of Congress to protect persons from injury in maritime service as repeatedly enunciated by the Supreme Court of the United States since the case of the *Western Maid*, 1922, 42 S. Ct. 159, 257 U. S. 419, 66 L. Ed. 299, is involved in the present petition.

2. The decision by the court below, if permitted to stand, would open the door to defenses of assumption of risk and contributory negligence in actions predicated on maritime law by invoking principles of state law in personal injury actions.

3. The decision by the court below sets back the clock of maritime law by many years, destroying the enlightened progressive concept uniformly expressed by the court since the acclaimed decision in *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85, 66 S. Ct. 872 and the authorities which follow without exception up to and including the recent decision of *Reed* v. *Steamship Yaka*, 83 S. Ct. 1349 and is in conflict with each and all of the holdings in said cases.

Statement

Petitioners, on the 14th day of February, 1959, were crew members of the tug boat, "Becky," in the employ of Hess Fuel Oils, Inc., the owner of said tug boat (102-103).*

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* References are to pages of the Record on Appeal.

Said tug boat had brought a loaded Gatco barge No. 40 to the west dock of respondent, Florida Power and Light Company, at Lauderdale Plant, Dania Cut-off Canal, Dania, Florida, at approximately 12:15 a.m. on February 14, 1959 (33).

A certain makeshift gangplank, owned by respondent and customarily used by it to provide access to its business invitees to its premises, the said dock, was put in use as a gangway to get to and from the Gatco barge and the west dock owned by respondent (34, 64, 67, 139-140).

At approximately 12:15 a.m. on February 14, 1959, petitioner Carl V. Daniels, Jr., who was captain of the tug boat, "Becky," while walking across the aforesaid makeshift gangplank, fell from said plank into the water between the outer edge of the dock and the Gatco barge No. 40 (110-111). The space between the barge and the dock was approximately three feet (33-34). Daniels struck some heavy object and was rendered unconscious (39, 65). Petitioner James Speeney, to save Daniels from drowning, dove into the water and in doing so also struck an object and suffered very serious injury (39). C. H. Peterson, employee of respondent, helped to get petitioners out of the water on to the aforesaid barge (39).

The proximate cause of Daniels' falling into the water was the shifting of the aforesaid makeshift gangplank (110, 111).

The proximate cause of Speeney's injuries was the emergency created when Daniels' life was in obvious danger (39).

The Trial Court decided that the aforesaid makeshift gangplank was not inherently dangerous and accordingly held that petitioners had no cause of action against respondent (165).

There was no determination by the Trial Court as to the question of negligence in putting to use, in accordance with respondent's prevailing custom, a makeshift gangplank under circumstances which created a foreseeable hazard to business invitees, such as petitioners (165).

The respondent (18), in its Second Defense to petitioner Daniels' Libel and (22) in its Second Defense to petitioner Speeney's Libel, admit ownership of the ladder in question as well as authorization for its unlimited use by petitioners' employer.

Cecil H. Peterson, an employee of Florida Power and Light Company, was called as a witness on behalf of petitioners. He testified he was an auxiliary equipment operator (32).

He testified that he boarded the vessel a few minutes after midnight, on the day in question, in the furtherance of respondent's work (33): that the ladder in question had been in common usage as a gangplank for a long period of time "* * * by most of the people to step on to the barge or on to the dock." The barge was 150 feet long, 30 feet to 35 feet wide (34). He further described the gangplank as follows (35):

> "A. It was aluminum, aluminum construction with round rungs connecting the side pieces or runners of the ladder. The boards were laid, wooden boards were laid up and down the length of the ladder."

He admitted that the ladder used as a gangplank was very narrow, 12 inches wide, consisting of 2 wooden boards, 12 feet to 15 feet long, each board 5 inches to 6 inches wide, about ½ inch thick, placed on top of the aluminum ladder, with a small line on one end of the ladder (36).

The ladder had no rails and the line had no safety function as it was hanging loose on the ladder (37).

Peterson was the man who heard the splash when Daniels fell into the water (38) and saw Speeney jump in after him. He testified that he helped take the men from the water, at which time Daniels was unconscious and Speeney was in a semi-dazed condition (39). Both of the petitioners were removed from the scene by ambulance (42).

Peterson's testimony established knowledge and consent by Florida Power & Light Company to use the aforesaid ladder as a gangplank, not only by its own employees but by business invitees as well (57).

Petitioner Speeney testified that the ladder was customarily used as a gangplank by respondent's employees as well as business invitees (64, 67).

He testified that the ladder was aluminum, and, as it rested on iron and cement on the dock, it would slip; that there was nothing with which to secure the ladder to keep it from slipping (95-96).

Petitioner Daniels testified that the gangplank consisted of an aluminum roofing ladder with planks on top of the rungs (106); that the gangplank had no rails or anything to hold on to; that there was nothing to keep the ladder from slipping from side to side on the dock (109).

Melvin E. Hopstetter, called on behalf of petitioners, testified that he was employed by Gateo and was familiar with the tug "Becky," and "Barge 40" (136); that he was employed by Hess Fuel Oil in the capacity of Barge Captain on the day in question. Hopstetter's testimony corroborated knowledge and authority on the part of respondent as to the use of the ladder as a gangplank in the manner used by petitioners (139-140).

Samuel Palka, qualified as an expert on barges and gangplanks, (153) testified that he was familiar with the "Becky" and "Barge 40," as well as the area where the accident occurred (154-155); that the gangplank consisted of nothing but a straight ladder with boards thereon, without rails and without any means to keep the ladder secure (156-157).

Palka testified that the gangplank was "not reasonably safe" (161).

He further testified that a Captain James Kellum and he, himself, had also fallen on that very gangplank (162).

Argument

The owner of dangerous maritime equipment is not entitled to immunity from liability for the proximate consequences of the use thereof by seamen in the contemplated and traditional manner.

It is a matter of common sense and knowledge that much use is now being made of leased and otherwise "borrowed" personal property in both industry and commerce.

Heretofore, prior to the *Sieracki* decision, *supra*, the question of control determined liability and thus owners of dangerous equipment felt that they had no duty toward the safety features of its property which it authorized others to use.

The extensive use of such property at the present time as compared to former years requires re-evaluation of the nature and extent of the legal responsibiilty on the owners for the reasonable fitness of such articles for the purpose intended.

The enunciation by the court below that Speeney was barred from recovery by reason of the alleged assumption of risk and contributory negligence of Daniels, has no basis

in any prior decision. There is no authority for charging Speeney with imputed negligence on the basis of a fellow seaman's conduct.

The holding that "maritime and Florida law bars recovery" constitutes a radical departure from uniform and well-established law.

The following holding by the court below is the enunciation of a concept which is a radical departure from uniform and established law:

> "Furthermore, appellants had used the ladder many times before, and even on the night of the accident; and such risk or danger, if any, as attached to the use of the ladder was so reasonably apparent as to be a bar under the circumstances."

The holding that

> "There was no duty on Florida Power to supply a ladder in the first place. Even if it be argued that customary use with knowledge of Florida Power imposed some duty, our attention is not called to any theory whereunder a duty was imposed on Florida Power under these facts to supply a ladder that would not slip or one with handrails on it,"

has overlooked the cases cited by petitioners in Point II of Appellants' Brief in the court below.

The aforesaid holding is in conflict with applicable law, as will be fully pointed out by a reprint herein of Point II of Appellants' Brief in the court below (see Appendix 1).

The distinction drawn by the court below as to conditions before and after delivery of the offending object cannot possibly carry any weight, as the condition of the gangplank was unchanged, before and after control thereof by the Florida Power and Light Company.

The misinterpretation, by the court below, of the holding in the case of *Canella* v. *Lykes Bros. S.S. Co.*, 174 F. 2d 794 relied on by said court below is obvious when one considers Chief Judge LEARNED HAND's words at page 796:

> "Thus in final result to impose upon the owner-demisor a direct personal liability to a longshoreman for injuries resulting from an unseaworthiness antedating delivery, is to impose no greater loss than could be made to fall upon him as the law is. It would merely avoid a circuity of action."

The correct law was again enunciated in the case of *Dimas* v. *Lehigh Valley Railroad Co.*, 231 F. 2d 151, at page 154:

> "* * * because the law in this circuit is that not even an owner, albeit out of control, is liable for an unseaworthy condition arising after control has been transferred."

The learned court below misinterpreted the holdings in the very cases on which the decision of said court rests, stating, in its opinion, *Daniels* v. *Florida Power & Light Company*, 317 F. 2d 41, at page 43, as follows:

> "We think it undoubted that the unseaworthiness doctrine rests primarily on the relationship of employer and employee, and that operation and control may suffice as a substitute for the employer factor of this relationship."

Thereafter, the court below *sua sponte*, modified the last paragraph on page 43, by substituting the following:

> "The idea of seaworthiness and the doctrine of implied warranty of seaworthiness arises out of the vessel, and the critical consideration in applying the doctrine is that the person sought to be held legally liable

must be in the relationship of an owner or operator of a vessel." *

The decision below devitalizes the remedial legislation and court decisions which have been the controlling factors in providing safeguards against injury from foreseeable injuries to maritime workers.

This decision, if permitted to stand, would re-establish defenses of state law which heretofore have been excluded by federal law.

The decision by the court below, if permitted to stand, would constitute immunity to owners of ship's gear and equipment, with no responsibility for fitness for intended use so long as there was no inherent danger, and thus foster unconcern as to the safety of ship's gear and equipment for its traditional use in maritime service.

Danger invites rescue. Both petitioners being seamen, applicable law compelled rescue.

It is well settled law of the sea that mariners must attempt to rescue men overboard. *Petition of Trans-Pacific Fishing & Packing Co.*, 152 F. Supp. 44, 43:

> "It is the duty of every shipowner and ship operator to use every possible available means to rescue from the sea any and all persons and members of its crew who may be unfortunately washed overboard."

Di Nicola v. Pennsylvania R. Co., 158 F. 2d 856, 857:

> "The defendant's chief contention appears to be that it owed no duty whatever to the decedent to rescue him after he fell overboard; and that we wholly repudiate."

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* The full modification is not officially reported as yet, but is set forth at length in the appendix hereto.

Mr. Justice CARDOZO, in *Wagner* v. *International Ry. Co.*, 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1, observed that:

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer * * *"

See also footnote 1 at page 692 in the case of *Rovinski* v. *Rowe*, 131 F. 2d 687.

CONCLUSION

There is no legal basis for creating a revolutionary concept that maritime law should be applied differently to ship's appurtenances than to the ship itself.

There is no legal basis for holding petitioner Speeney guilty of assumption of risk and contributory negligence in rescuing his captain, Petitioner Daniels, from drowning.

Important questions of substantive federal law pertaining to an industry of great economic and social significance are here presented.

The inroads and modification of the duty of suppliers of ships gear if permitted to stand, would invite further dilution, if not complete nullification, of such duty of persons in a position to provide safeguards against the dangers of foreseeable accidents being of concern to all interested in maritime service merits consideration, review and instruction by this honorable court.

Respectfully submitted,

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Appendix 1

Point II of Appellants' Brief in the U. S. Court of Appeals

POINT II

APPELLANTS WERE ENTITLED TO A DECREE IN THEIR FAVOR ON THE BASIS, NOT ONLY OF MARITIME LAW, BUT OF FLORIDA STATE LAW, AS WELL:

A. MARITIME LAW MAKES NO DISTINCTION AS TO LIABILITY BASED ON AN UNSEAWORTHY OR NEGLIGENT CONDITION INVOLVING A VESSEL OR A SIMILAR CONDITION INVOLVING A GANGPLANK USED IN THE FUTHERANCE OF THE VESSEL'S BUSINESS.

B. FLORIDA STATE LAW MAKES NO DISTINCTION AS TO THE DUTY BETWEEN AN EMPLOYER AND A THIRD PARTY SUPPLIER OF A DEFECTIVE APPLIANCE FOR USE BY A BUSINESS INVITEE.

The gangplank was used in a foreseeable manner by appellee's duly authorized business invitees, and, as such, appellee owed appellants the duty of due care. See pages referred to under Point I, *supra*.

Standard Oil Co. v. *Robbins Dry Dock & Repair Co., supra*, 25 F. 2d 339, aff'd 32 F. 2d 182.

Radoslovich v. *Navigazione Libera Triestina, S. A.*, 72 F. 2d 367:

> "We do not find it necessary to discuss any of the points raised except whether the plaintiff was in law an invited person. The judge told the jury that he was, that the defendant owed him a positive duty of reasonable care for his safety, and that, if they found that the gangplank was negligently maintained, he might

recover. Although there is possibly some question as to the finality of his instruction we accept the defendant's intepretation, and shall treat what he said as a peremptory direction. It was correct. As invited person is one who enters the premises of another not only for his own purposes but in the interest of the owner, who must be aware that the mutual interest of both may lead to such an entry. N. Y. Lubricating Oil Co. v. Pusey, 211 F. 622, 625 (C. C. A. 2); Middleton v. P. Sandford Ross, 213 F. 6, 10 (C. C. A. 5); Heskell v. Auburn L., H. & P. Co., 209 N. Y. 86, 91, 102 N. E. 540; L. R. A. 1915 B, 1127; Restatement, Torts, § 202, Comment b."

Sagessier v. *Sears Roebuck & Company*, 230 F. 2d 806, 808:

"[2-3] The general rule as to the duty of care owed to an invitee is stated by the Supreme Court of Florida to be as follows:

'Where a person or corporation invites a member of the public into his or its place of business, he or it owes such person a duty with respect to his safety which may vary with the circumstances of each case. This is essentially true of a public utility corporation such as a common carrier. In any event there is a duty to have the place of business in a reasonably safe condition. And the care required depends upon the circumstances of each case.'"

Pogue v. *Great Atlantic & Pacific Tea Company*, 242 F. 2d 575, 579:

"* * * the diligence required of the proprietor must be comparable to that necessary under the circumstances to prevent accidents."

Oakes v. *Graham Towing Co.*, 135 F. Supp. 485, 487:

> "All the circumstances of the case * * * R.T.C.'s control of the vessel, the fact that it furnished the only means of ingress and egress which the crew could use, its ownership of the drydock and the premises on which the work was being done, its contractual relation with the shipowner—evidence the fact that R.T.C. impliedly, if not expressly, had undertaken to discharge the non-delegable duty of providing safe ingress and egress."

Appellee owed appellants the positive duty of reasonable care for their safety, and the use of the improvised defective gangplank constituted negligence on the part of appellee, as a matter of law. See: *Radoslovich* v. *Navigazione Libera Triestina, S.A., supra.*

Murgatore v. *United States*, 100 F. Supp. 276, 282:

> "The contractor and the shipowner each owed a duty to decedent and 'neither could devolve his duty to him upon the other, however much they might agree upon its final incidence as between themselves, or whether the law would do so without agreement.' Vanderlinden v. Lorentzen, supra, 179 F. 2d at page 997; Anderson v. Lorentzen, 2 Cir., 160 F. 2d 173, 174-175; LaGuerra v. Brasileiro, 2 Cir., 124 F. 2d 553, certiorari denied 315 U. S. 824, 62 S. Ct. 918, 86 L. Ed. 1220; Porello v. United States, 2 Cir., 153 F. 2d 605; Fodera v. Booth American Shipping Corporation, 2 Cir., 159 F. 2d 795."

The recent decision by the United States Court of Appeals, Fifth Circuit, June 29, 1960, held as follows in the case of *Emerson* v. *Holloway Concrete Products Company* (5 Cir. 1960), 282 F. 2d 271 at page 270:

> "'A greater duty is owed to an invitee than to either of the other class of persons above mentioned. The

owner or occupant owes an invitee the duty of keeping the premises in a reasonably safe condition, and, as plaintiff contends, also to guard against subjecting such person to dangers of which the owner or occupant is cognizant or might reasonably have foreseen.' (Citing authorities) 118 So. 2d 636, 637."

The properties of aluminum are not unknown. It is common knowledge that aluminum has a tendency to slip and, even as a straight ladder, it is far from stable, having a tendency to bend and wobble in mid-section upon application of weight.

Common sense, logic and justice prohibits either a factual or legal conclusion that the use of, or permission to use, such a ladder, as a gangplank, was anything but a callous disregard of the human safety of business invitees.

The gangplank, when used as a ladder, might be considered a useful tool, but, when used as a gangplank without rails (37), constituted a breach of duty and negligence.

This question was fully discussed by the Court of Appeals, Fifth Circuit, in the case of *Fall* v. *Esso Standard Oil Company*, 297 F. 2d 411, decided December 13, 1961, rehearing denied February 22, 1962.

Appellant Daniels was entitled to assume that the ladder was safe to be used as a gangway. *Smith* v. *United States*, 121 F. Supp. 772. In the case of *Smith* v. *United States*, *supra*, the Court held that it is negligence to provide an unseaworthy ladder. Furthermore, a person using a ladder to board a ship is entitled to assume that it is reasonably safe for the purpose intended.

The Gangway Was an Improvised Ladder Coming Squarely Within the Legal Concept of a Defective and Dangerous Gangway

The gangplank was part of the ship as a matter of law. See *The Admiral Peoples*, 295 U. S. 649, 55 S. Ct. 885, 79 L. Ed. 1633.

The condition of the gangplank and its use, constituted both unseaworthiness and negligence on the basis of uniform, well settled and controlling law.

As early as 1866, in the case of *Hrebrik* v. *Carr*, 29 Fed. 298, the Court held that the use of a single, narrow plank, without battens or ropes, constituted negligence. At the turn of the century, in the case of *Burrows v. Lownsdale*, 133 Fed. 250, 251, in treating with a gangplank similar in dimensions to the one involved in the instant case, the Court stated:

> "It is about 10 feet long, 16 inches wide, 1 inch thick, and has small cleats nailed to one side of it about 19 inches apart. It has no railing ropes or guards of any kind, and had none at the time of the accident in question."
>
> • • •
>
> "Such a plank as that described, extending over the water at such an angle, without any railing, ropes, or guards, is not a reasonably safe means of passage for man, woman or child, of whatever age."

The *Burrows* case was cited with approval in 1928 in the *Bainbridge* case (not officially reported), 1928 AMC 1230. In the case of *Standard Oil Co.* v. *Robins Dry Dock & Repair Co.*, 32 F. 2d 182, the Court held at page 184:

> "The installation of a defective gangway for the use of employees involved active negligence on the part of

the dry dock company, whereas the neglect of the Standard Oil Company to inspect the gangway and to warn its employees against danger was a secondary fault of omission."

To the same effect, see *The Admiral Peoples, supra.*

The fact that the conditions might have been known to appellants does not absolve appellee from liability. *Grant v. United States Shipping Board Emergency Fleet Corp.*, 22 F. 2d 488.

There is no assumption of risk under the existing circumstances. *Zinnel v. United States Shipping Board E. F. Corporation*, 10 F. 2d 47.

Appellants are not chargeable with assumption of risk of an unseaworthy gangplank nor of an unsafe means of going to and from appellee's premises, as business invitees. *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424, 59 S. Ct. 262; *In Re People, infra.*

Appellee's warranty of fitness for the purpose intended is not limited to the appellants, employer, but applies with equal force to appellants. In *In re People*, 165 N. E. 832, 250 N. Y. 405, 417, the court stated:

> "The implication of a warranty of fitness is not peculiar to the law of sales; it arises in cases of bailment. Thus one who lets the property for hire impliedly warrants that it is suitable for the purpose for which it is hired and is liable for damages which may result from its unsuitability. Williston on Contracts, Sec. 1041; Vogan & Co. v. Oulton, 81 L. T. Rep. (N.S.) 435; Hyman v. Nye & Sons, L. R. 6 Q. B. D. 685; Fowler v. Lock, L. R. 7 Common Pleas, 272; Hoisting Engine Sales Co. v. Hart, 237 N. Y. 30, 142 N. E. 342, 31 A. L. R. 536".

See also (2 Cir.) *DeGioia v. U. S. Lines*, —— F. 2d ——, decided June 11, 1962 N. Y. L. J. p. 1, col. 1, 11/15/62.

Appendix 2

Opinion

CORRECTED
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 19924

CARL V. DANIELS, JR. and JAMES E. SPEENEY,
Appellants,
versus
FLORIDA POWER & LIGHT COMPANY,
Appellee.

Appeal from the United States District Court
for the Southern District of Florida,
May 8, 1963)

Before TUTTLE, Chief Judge, JONES and BELL,
Circiut Judges.

BELL, Circuit Judge: Appellants, Daniels and Speeney, filed separate libels in personam against Hess Fuel Oils, Inc., their employer, and Florida Power & Light Company, appellee, to recover for personal injuries which allegedly arose out of the unseaworthiness of a vessel owned by Hess on which they were employed, and the negligence of Florida

Power.[1] Their claims against Hess were settled prior to trial, and the consolidated causes proceeded against Florida Power. The libels were dismissed by the trial court for failure to establish negligence on the part of Florida Power after all proof of liability had been submitted by appellants. Unseaworthiness was not plead against Florida Power but it was unsuccessfully asserted in argument just prior to dismissal.

Appellants were captain and deck engineer, respectively, of the tugboat BECKY. The tug and GATCO Barge No. 40 were engaged in transporting oil from Port Everglades, Florida to the Florida Power & Light Company plant at Dania, Florida, on the Dania Canal. Appellants had been engaged in this work for some months, and almost daily. The tug and barge tied up on the night in question at the dock of Florida Power, and within three feet of it. The area was well lighted, and the waters of the canal were calm.

A ladder, owned by Florida Power, and usually found on the dock, was customarily used to span the three foot space between the dock and the barge. Employees of Florida Power used it for the purpose of going on the barge to arrange discharge of the fuel.

The ladder was twelve to fifteen feet in length, twelve inches in width, constructed of aluminum, with two boards affixed to the top of the ladder rungs running lengthwise of the ladder. There were either wooden cross pieces to serve as steps on top of the boards or sandpaper strips serving the same purpose at the time of the accident. This point is disputed but immaterial. The only employee of Florida Power present at the scene had used the ladder to board the barge but it was already in use at the time.

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[1] Their separate causes were consolidated for trial and for appeal.

Daniels had used it at least three times that night in going to and from the barge. Both he and Speeney had used it at least one hundred times in the past. The ladder was not fastened to the dock. It may or may not have been lashed to the barge although there was a rope attached to it for that purpose. No employees of Florida Power put the ladder in use. Speeney did not put it in use. Daniels could not remember whether he put it in use but did not deny doing so. The ladder led upward from the barge to the dock at an angle of fifteen to twenty degrees.

At any rate, while in the process of going from the barge onto the dock, Daniels lost his balance and fell into the shallow water in the space between the barge and dock, striking his head on either the barge or the dock in falling. Speeney jumped overboard to help him and was also disabled. The employee of Florida Power, being then on the barge, finally pulled both of them from the water without leaving the barge.

There was no evidence that there was anything at all defective about the ladder itself, either patent or latent. Appellants were satisfied to rest their case on the fact that the ladder had no handrails, and that it would slide on the concrete dock and metal barge because it was made of aluminum. Daniels testified that the ladder slipped as he started up it. He could not remember which way, or whether it was the end resting on the dock, or barge, or both that slipped.

Three errors are assigned on this appeal. First, it is contended that maritime law imposes liability on the owner and supplier of a defective gangplank for injuries sustained by a business invitee or crew member while using the gangplank in a foreseeable and authorized manner. Second, the same contention is made, but based on the Florida law of negligence as respects the duty owed a

business invitee. These assignments will be considered together since they both rest on an allegedly defective ladder constituting negligence. The last assignment is that Florida Power is liable under the unseaworthiness doctrine for making the vessel of another unseaworthy in supplying a defective, inadequate and unsafe ladder to serve as a gangplank in going to and from the premises of appellee.

The difficulty that appellants have in overcoming the finding of no negligence by the District Court is severalfold. There was nothing inherently dangerous about the ladder. It was not put in use by Florida Power. There was no duty on Florida Power to supply a ladder in the first place. Even if it be argued that customary use with knowledge of Florida Power imposed some duty, our attention is not called to any theory whereunder a duty was imposed on Florida Power under these facts to supply a ladder that would not slip or one with handrails on it. Furthermore, appellants had used the ladder many times before, and even on the night of the accident; and such risk of danger, if any, attached to the use of the ladder was so reasonably apparent as to be a bar under the circumstances. The trier of the facts concluded that there was no negligence and we agree, considered both from the standpoint of maritime and Florida law. See *Spaulding v. Parry Nav. Co.*, 2 Cir., 1951, 187 F. 2d 257; *Hickory House, Inc. v. Brown*, Fla. Sup. Ct., 1955, 77 So. 2d 249.

We come then to the claims insofar as they rest on the unseaworthiness doctrine. A seaman sustaining injuries by reason of the unseaworthiness of a ship or her tackle may recover compensatory damages, termed an indemnity, from the owner. *The Osceola*, 1903, 189 U.S. 158, 23 S. Ct. 483, 49 L. Ed. 760; *Mahnich v. Southern SS Co.*, 1944, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561; and Knauth's Benedict on Admiralty, Sixth Ed., p. 255. See also Gilmore & Black,

The Law of Admiralty, § 6-38, p. 315 et seq. for a full discussion of the scope and nature of the remedy under the doctrine of unseaworthiness.

Courts have refused to apply the doctrine to hold the owner of a ship under a bare-boat or demise charter. *Vitozi* v. *Balboa Shipping Company*, 1 Cir., 1947, 163 F. 2d 286; and *Muscelli* v. *Frederick Starr Contracting Company*, 1947, 296 N.Y. 330, 73 N.E. 2d 536. Contra: *Cannella* v. *Lykes Bros. Steamship Co.*, 2 Cir., 1949, 174 F. 2d 794, where the proof showed an unseaworthy condition when the ship was delivered to the charterer.[2] The Court of Appeals for the First Circuit to some extent limited the teaching of *Vitozi* in this respect in *Pichirilo* v. *Guzman*, 1 Cir., 1962, 290 F. 2d 812, reversed on another ground, 1962, 369 U.S. 698, 82 S. Ct. 1095, 8 L. Ed. 2d 205, by indicating that the rule, just as *Cannella* holds, might not extend to cases where the unseaworthy condition preceded the demise.

The refusal of the District Court to apply the doctrine to hold a husbanding agent, not the employer of the seaman and who did not operate and control the vessel at the time of the injury was affirmed in *Romero* v. *International Terminal Operating Company*, 1959, 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368. The case was remanded by the Supreme Court for trial on the claim based on negligence, as distinguished from unseaworthiness, with the following statement:

> "Petitioner made claims based both on the Jones Act and the general maritime law against Garcia & Diaz, Inc. At the pre-trial hearing the District Court concluded that Garcia & Diaz was not Romero's em-

[2] *Vitozi* and *Cannella* involved stevedores claiming the rights of seamen under *Seas Shipping Company* v. *Sieracki*, 1946, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099. *Muscelli* involved a seaman employed by the charterer.

ployer and did not operate and control the vessel at the time of the injury. These issues were properly adjudicated, and thus the claims for unseaworthiness and maintenance and cure were properly dismissed. However, the District Court did not consider, and its disposition of the case did not require it to consider, whether petitioner was asserting a claim based upon the negligence of Garcia & Diaz; a claim independent of the employment relationship or operation and control. Thus it is necessary to remand the case for further proceedings as to this respondent."

The idea of seaworthiness and the doctrine of implied warranty of seaworthiness arises out of the vessel, and the critical consideration in applying the doctrine is that the person sought to be held legally liable must be in the relationship of an owner or operator of a vessel. The usual relationship for recovery has been referred to as three-cornered: master, i.e., owner or operator, vessel and shipworker. *Dimas* v. *Lehigh Valley Railroad Company*, 2 Cir., 1956, 234 F. 2d 151. The sole connection of the dock owner here with the ship on which the injured seamen were employed was in the tacit allowance of the use of the ladder by the seamen. The dock owner did not occupy the position of owner or operator of the vessel. The refusal of the District Court to apply the doctrine was proper.

Having already found from a careful consideration of the record that appellant failed to prove negligence, it follows that the case is free of error, and the judgment of the District Court must be and is

AFFIRMED.[3]

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[3] We do not reach the motions to dismiss filed in this court by appellee.

Appendix 3

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19924

D. D. Docket No. 2078-M-Adm. & 2079-M-Adm.

CARL DANIELS, JR. and JAMES E. SPEENEY,

Appellants,

versus

FLORIDA POWER & LIGHT COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, JONES and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellants, Carl V. Daniels, Jr., and James E. Speeney, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 8, 1963

Issued as Mandate: